PP

v.

AMIL AKMAD

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CRIMINAL APPEAL NO: S-05-46-2004]
20 JUNE 2007

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drug - Appeal by prosecutor against acquittal of accused - Whether accused had knowledge of nature of drug - Whether accused a trafficker - Whether accused only in possession of dangerous drug and guilty under s. 12(2) Dangerous Drugs Act 1952*

The accused/respondent was charged with trafficking in a dangerous drug, to wit 74.93 grams of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') punishable under s. 39B(2) of the Act. At the end of the trial, the High Court judge acquitted the accused after hearing his defence, holding that the prosecution had failed to prove that the respondent had knowledge of the methamphetamine and in the absence of such knowledge, the respondent could not be said to be in possession of the methamphetamine and could not, therefore, be guilty of trafficking, and neither had the prosecution in the circumstances aforesaid made out a case for possession against the respondent. The prosecutor appealed, contending that the trial judge had erred in failing to consider that since the prosecution had shown that the respondent was in possession of the said drug without resorting to s. 37(d) of the Act, the respondent must have had knowledge of the nature of the drug.

Held (allowing the appeal, and sentencing the respondent to 15 years' imprisonment and ten strokes of the rotan)
Per James Foong JCA delivering the judgment of the court:

(1) On the facts, it was unreasonable not to believe from the evidence that the respondent was unaware that the "barang" he was to deliver to one Suraida Tan was not an illicit drug – as determined by the chemist to be methamphetamine – for the following reasons: (i) for this simple errand the respondent

A was paid handsomely, which was against the normal cost paid for carrying out such a simple task, unless it was for something unlawful; (ii) this was not the first time the respondent performed such a mission. It was his third time when he was apprehended; (iii) before the attempted delivery,
B the respondent had kept the "barang" under lock and key in his cupboard in his house. This implied that the "barang" was something of value or illicit otherwise there was no necessity to be so cautious; (iv) the respondent had every opportunity to open the packets to examine its contents. He had ample
C opportunity to do so, this being a clear case of wilful blindness; and (v) above all, he knew the "barang" to be white powder, which strongly suggested that he knew it could not be anything else under those circumstances except an illicit drug. Thus, the learned judge had erred in his conclusion
D that the respondent had no knowledge that the illicit drug found on him was methampetamine. (paras 6 & 7)

(2) There was creditable evidence to support the respondent's defence that he was only a carrier. One was the existence of
E one Hajjah Salhah and the other was Suraida Tan's claim that the respondent had indeed told her that the "barang" belonged to Hajjah Salhah. Further, the respondent was in fact on his way to make a delivery when he was apprehended. All this would be sufficient to warrant acquitting the
F respondent of the charge of trafficking as he had raised a reasonable doubt in his defence which said otherwise. The respondent's attempted escape upon being confronted by the police before his arrest did not indicate his guilt to the offence charged. Based on the evidence adduced, the incident could
G be attributed to the police's aggressive act of apprehending the respondent or it could be that he was in a state of panic and had foolishly reacted in this way when faced with the prospect of an arrest. (paras 8 & 9)

H **(3)** The respondent may not be a trafficker of the illicit drug but based on the reasons as stated, he was in possession of it and, therefore, was guilty under s. 12(2) of the Act and punishable under s. 39A(2) of the Act. (para 9)

I

Bahasa Malaysia *translation of headnotes*

Tertuduh/responden dituduh dengan kesalahan mengedar dadah berbahaya, iaitu 74.93 gram methamphetamine, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') yang boleh dihukum di bawah s. 39B(2) Akta. Di akhir perbicaraan, hakim Mahkamah Tinggi membebaskan responden setelah mendengar pembelaannya atas alasan bahawa pendakwaan gagal membuktikan bahawa responden mempunyai pengetahuan tentang methamphetamine, dan dalam ketiadaan pengetahuan responden tidak boleh dikatakan mempunyai milikan methamphetamine sekaligus tidak boleh disabitkan dengan kesalahan mengedar, dan lagi bahawa pendakwaan, dalam keadaan yang wujud, gagal membuktikan suatu kes pemilikan terhadap responden. Pendakwa merayu dan berhujah bahawa hakim bicara khilaf kerana tidak mempertimbangkan bahawa, oleh kerana pendakwaan telah membuktikan bahawa responden mempunyai milikan dadah tersebut tanpa bergantung kepada s. 37(d) Akta, maka responden semestinya mempunyai pengetahuan mengenai sifat dadah.

Diputuskan (membenarkan rayuan dan menjatuhkan hukuman 15 tahun penjara dan sepuluh sebatan rotan)
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta, adalah tidak munasabah dari keterangan yang ada untuk mempercayai bahawa responden tidak menyedari bahawa "barang" yang hendak diserahkan beliau kepada seorang Suraida Tan itu bukan dadah terlarang – yakni methamphetamine seperti yang diputuskan ahli kimia – atas alasan-alasan berikut: (i) responden telah dibayar dengan lumayan sekali atas usaha mudahnya, yang mana ia adalah bertentangan dengan kadar biasa yang dibayar bagi tugas semudah itu, melainkan jika ia suatu tugasan haram; (ii) Ini bukan pertama kali responden melakukan misi tersebut, di mana ketika ditangkap ia sedang melakukan tugas kali yang ketiga; (iii) sebelum cubaan penyerahan dibuat, responden telah menyimpan "barang" dalam almari yang berkunci di rumahnya. Ini menunjukkan bahawa "barang" adalah suatu yang berharga atau haram kerana jika tidak tiada keperluan untuk bertindak secara begitu berhati-hati; (iv) responden mempunyai segala peluang untuk membuka paket-paket dan memeriksa kandungannya. Beliau mempunyai banyak peluang untuk

berbuat begitu tetapi telah bertindak dengan melulu; dan (v) beliau tahu bahawa "barang" adalah serbuk putih, sekaligus menandakan dengan jelas bahawa dalam keadaan yang wujud beliau tahu bahawa ia tidak lain tidak bukan adalah dadah terlarang. Oleh itu, yang arif hakim bicara khilaf dalam rumusannya bahawa responden tiada pengetahuan bahawa dadah terlarang yang dijumpai pada dirinya adalah methampetamine.

(2) Terdapat bukti yang boleh dipercayai bagi menyokong pembelaan responden bahawa beliau hanyalah seorang pembawa. Pertama adalah kewujudan Hajjah Salhah dan kedua adalah dakwaan Suraida Tan bahawa responden ada memberitahunya bahawa "barang" adalah kepunyaan Hajjah Salhah. Selain itu, responden sememangnya sedang dalam perjalanan untuk membuat penyerahan apabila beliau ditangkap. Semua ini adalah memadai untuk membebaskan responden dari pertuduhan mengedar kerana pembelaannya menyerlahkan keadaan sebaliknya sekaligus membangkitkan satu keraguan munasabah. Percubaan responden untuk melepaskan diri semasa diserbu polis sebelum ditangkap tidak menunjukkan kesalahan beliau terhadap pertuduhan. Berasaskan keterangan yang dikemukakan, insiden itu boleh dikaitkan dengan kekasaran polis dalam memberkas responden, atau mungkin juga responden berada dalam keadaan panik dan bertindak secara bodoh ketika berdepan dengan kemungkinan ditangkap.

(3) Responden mungkin bukan seorang pengedar dadah terlarang, namun berdasarkan alasan-alasan di atas, beliau mempunyai milikannya dan dengan itu melakukan kesalahan di bawah s. 12(2) Akta dan boleh dihukum di bawah s. 39A(2) Akta.

Case(s) referred to:
Abdullah Zawawi bin Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(d), 39A(2), 39B(1)(a)

For the appellant - Mangaiarkarasi Krishnan DPP
For the respondent - Frederick KC Pang; M/s Lau Ngan Siew & Co

Reported by Suresh Nathan

JUDGMENT

James Foong JCA:

Introduction

[1] The respondent was charged for an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) in the Sandakan High Court and the said charge reads as follows:

> That you, on the 31st day of May, 2002 at about 10.15am at the five-foot way of Kedai Perabot Afgan, Pekan BDC, in the District of Sandakan, in the State of Sabah, did on your own behalf traffic in a dangerous drug to wit 74.93 grammes of Methamphetamine and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act, 1952 (Act 234) and punishable under Section 39B(2) of the same Act.

[2] At the end of the trial, the High Court acquitted the accused after hearing his defence. The reasons proffered by the High Court in acquitting him are:

> In the premises the prosecution had failed to prove that the accused had knowledge of the methamphetamine and in the absence of such knowledge the accused cannot be said to be in possession of the methamphetamine and cannot, therefore, be guilty of trafficking, and neither has the prosecution in the circumstances aforesaid made out a case for possession against the accused. I, therefore, acquit and discharge the accused.

Facts Of The Case

[3] The facts of this case are comprehensively set out by the trial judge as follows:

> At about 7.15 am on 31.5.2002 the Police arrested one Suraida Tan (PW5) for alleged possession of a dangerous drug. As a result of interrogation by the Police, Suraida Tan revealed that she had on the previous day planned to meet the accused later that morning for the accused to bring to her the 'barang'. A plan was quickly devised to trap the accused. Suraida Tan made a phone call to the accused to re-confirm their appointment for the accused to deliver the 'barang' to her. She arranged to meet the accused at 10.00 am at Kedai Perabot Afgan. A police party consisting of 10 policemen in plain clothes led by ASP Ahmad Kamaruddin Abdullah (PW3) went to the vicinity of Kedai Perabot Afgan,

accompanied also by Suraida Tan to entice the accused to indicate to the police by means of a pre-arranged signal the identity of the accused upon his appearance for the appointment with Suraida Tan. While waiting for the accused to appear for the appointment Suraida Tan members of the police party were split and deployed at different places in the vicinity of Kedai Perabot Afgan while Suraida Tan was stationed in front of Kedai Perabot Afgan. When the accused eventually appeared and was approaching Suraida Tan, she gave the pre-arranged signal to Inspector Amanjit Singh (PW4) who together with Detective Lance Korporal Rosman bin Abu trailed from behind before both of them pounced on the accused and successfully overpowered him assisted by ASP Ahmad Kamaruddin Abdullah. Subsequently, ASP Ahmad Kamaruddin Abdullah searched the trousers pocket of the accused and retrieved from the front left pocket of his trousers a black plastic bag which was opened in front of the accused and members of the police party including Inspector Amanjit Singh. Inside the black plastic bag was a white envelope which contained two plastic packets each containing a crystalline substance. The crystalline substance was conclusively proved by the Government Chemist, one Ahmad Ridzuan Ibrahim (PW1) to be methamphetamine weighing 74.93 grammes.

The case for the defence was that the accused was an innocent carrier of the methamphetamine. Under cross-examination ASP Ahmad Kamaruddin Abdullah admitted that the accused had told him that the methamphetamine belonged to one Hajjah Salhah and at about 7.45 pm on the day the accused was arrested, he led ASP Ahmad Kamaruddin Abdullah to his place of abode where Hajjah Salhah was a lodger and recovered suspected dangerous drugs which ASP Ahmad Kamaruddin Abdullah seized. Hajjah Salhah was in the house at the time and she was also arrested. Suraida Tan also testified that the accused had told her that he was delivering the 'barang' for somebody and that it belonged to Hajjah Jalha who was also known as Hajjah Salhah.

Accused testified that the methamphetamine that was found in his trousers pocket on the day he was arrested was the "barang" meant for delivery to Suraida Tan. He said he was doing it to earn extra income as he had also made a similar delivery to Suraida Tan about 2 weeks earlier and was paid KM100 by Hajjah Salhah. Although he admitted that he had seen the crystalline substance contained in plastic packets which he had kept for Hajjah Salhah under lock and key in his house he denied any knowledge of what the crystalline substance actually was. He did not ask Hajjah Salhah what it was because he feared that

asking too many questions would jeopardize his opportunity of earning an extra income. To him the RM100 he was paid by Hajjah Salhah for his earlier errand was a lot of money. He only earned about RM300 per month working at the Sandakan Port.

The Prosecution's Contention

[4] The main thrust of the prosecutor's appeal is that the trial judge had erred in failing to consider that "since the prosecution had shown that the respondent was in possession of the said drugs without resorting to s. 37(d) DDA, the respondent must have knowledge of the nature of the drug".

My Assessment

[5] Though the learned trial judge did not make any positive ruling on the issue of possession by the respondent of the illicit drug found in his pocket, which is an essential ingredient to an offence faced by the respondent, he called for respondent's defence after the close of the prosecution's case. By adopting this course of action, it must be implied that the prosecution had proved to the satisfaction of the court that the respondent was not only in possession of the illicit drug but also knew of the nature of the said drug. Yet, when considering the merits of the respondent's defence, the trial judge said:

It is apparent that the case for the defence showed the accused to be not only naive but gullible. The accused did not ask for an explanation of the actual 'barang' he was asked by Hajjah Salhah to keep in his cupboard although he admitted to having seen the 'barang' to be white powder ("tepung putih") nor did he ask about it even when he was to deliver two packets of the barang to Suraida Tan on 31 May 2002 which led to his arrest. It is fallacious for the prosecution to equate knowledge that the 'barang' is valuable necessitating safe custody in a cupboard, to the accused having knowledge that the 'barang' was methamphetamine or that the 'barang' delivered by the accused to Suraida Tan on one previous occasion was methamphetamine. The latter part of each of the foregoing equations require more than mere assumption.

[6] I am of the view that this finding is against the weight of evidence adduced. It is unreasonable not to believe from the evidence that the respondent was unaware that the 'barang' he was to deliver to Suraida Tan was not illicit drug as determined by the chemist to be methamphetamine. The reasons are these:

A First, for this simple errand the respondent was paid handsomely which was against the normal cost paid for carrying out such simple task, unless it was for something unlawful. Second, this was not the first time the respondent performed such mission. It was his third when he was apprehended. Third, before the attempted
B delivery, respondent had kept the 'barang' under lock and key in his cupboard in his house. This implies that the 'barang' was something of value or illicit otherwise there was no necessity to be so cautious. Fourth, the respondent had every opportunity to open the packets to examine its contents. There was nothing to
C prevent him from investigating. He had ample opportunity to do so. This is a clear case of wilful blindness. Finally, above all, he knew the 'barang' to be white powder. This strongly suggests that he knew that it could not be anything else under those circumstances except illicit drug. He may not know the scientific
D name of the drug in his custody but certainly he knew it to be 'syabu', the street name for this sort of drug, as Suraida Tan had testified.

[7] In the face of these, I find that the learned judge has erred
E in his conclusion that the respondent had no knowledge that the illicit drug found on him was methamphetamine.

[8] Though the prosecution had proved that the respondent was in possession of the illicit drug but was he a trafficker? The
F respondent in his defence has said that he was only a carrier and the trial judge believed him. And there were creditable evidence to support this. One was the existence of Hajjah Salhah and the other wad Suraida Tan's claim that the respondent had indeed told her that the "barang" belonged to Hajjah Salhah. Further, the
G respondent was in fact on his way to make a delivery when he was apprehended. These, in my opinion would be sufficient to warrant acquitting the respondent of the charge of trafficking as he had raised a reasonable doubt in his defence which says otherwise – see *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311.
H

[9] The learned deputy prosecutor before us has also stressed that the respondent, upon being confronted by the police before his arrest had attempted to escape. This indicates his guilt to the offence charged. The learned trial judge found otherwise and
I attributed the incident to an aggressive act by the police in

apprehending the respondent. Based on the evidence adduced, I support this finding of the trial judge but wish to add that even if the respondent had attempted to run away, this could equally imply that he was in a state of panic and had foolishly reacted in this way when faced with the prospect of an arrest – see *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1. This does not indicate his guilt to the offence charged.

[10] The respondent may not be a trafficker of the illicit drug but I am convinced that based on the reasons as stated, he was in possession of it and therefore is guilty under s. 12(2) of the Dangerous Drugs Act 1952, punishable under s. 39A(2) of the same Act. We found him guilty of this and after his plea of mitigation, we sentenced him to 15 years in prison from date of arrest and ten (10) stroke of rotan.

Post Script

[11] My learned brother judges, Raus Sharif JCA and Abdull Hamid Embong JCA after reading the draft of this judgment had concurred with the views expressed therein.